***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

75-7677,7681

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

RANDOLPH PHILLIPS,
*Plaintiff-Appellee,*

v.

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each in their own capacity as directors of Alleghany Corporation, and as attorneys [illegible] and guardians of the property of Allan P. Kirby, [illegible], JOHN J. BURNS, JR.,
*Defendants-Appellants,*

RALPH K. GOTTSHALL, RICHARD [illegible] HOUGH, WILLIAM G. RABE, CLIFFORD H. RAMSDELL, and CARLOS J. ROUTH, as directors of Alleghany Corporation,
*Defendants,*

and ALLEGHANY CORPORATION,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## REPLY BRIEF OF ALLEGHANY CORPORATION

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June 14, 1976

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*Plaintiff-Appellee,*

v.

John E. Tobin, Fred M. Kirby, Allan P. Kirby, Jr., each in their own capacity as directors of Alleghany Corporation, and as attorneys for and guardians of the property of Allan P. Kirby, Sr., John J. Burns, Jr.,

*Defendants-Appellants,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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## REPLY BRIEF OF APPELLANT ALLEGHANY CORPORATION

Defendant-appellant Alleghany Corporation ("Alleghany") submits this reply brief in further support of its appeal, pursuant to 28 U.S.C. § 1291 (1970), from

> "so much of the order of the United States District Court for the Southern District of New York (Hon.

Robert J. Ward, J.), dated November 5 and entered November 6, 1976, as denied Alleghany's motion to dismiss plaintiff Randolph Phillips' amended complaint on either of the grounds that Mr. Phillips, a layman, cannot prosecute *pro se* a derivative action on behalf of Alleghany or that Mr. Phillips is not an adequate representative plaintiff who may maintain a derivative action on behalf of Alleghany pursuant to Rule 23.1 of the Federal Rules of Civil Procedure." (Notice of Appeal; Joint Appendix 209a.)*

Alleghany filed its principal appellate brief on February 20, 1976; Mr. Phillips filed an answering brief, to which we here respond, on June 1, 1976.

Mr. Phillips' brief is less a legal argument than an autobiographical apologetic. Mr. Phillips is attracted to Foley Square, not by concern for Alleghany and its stockholders, but by the remembered thrills of the chase. We submit that the courts of the United States need not and should not serve as the arena for his sport.

## POINT I

### Mr. Phillips, a Layman, May Not Prosecute a Derivative Action As a *Pro Se* Plaintiff.

Alleghany's principal brief demonstrates (at pp. 9-17) that Mr. Phillips, by attempting to conduct personally a derivative action, is improperly acting as an attorney for someone other than himself.

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* The four individual defendants whom plaintiff has served with process, each a director of Alleghany, have presented a similar appeal which has been consolidated with Alleghany's for purposes of briefing and argument.

Mr. Phillips' main counter is the contention that he, as allegedly an Alleghany shareholder, had standing to file a derivative complaint. So he did, but that does not alter the basic fact that the action posed by his pleading was brought on behalf of, and to further an alleged interest of, Alleghany. The claim is not Mr. Phillips', but that of the corporation, which must be represented by a qualified attorney.

As the Appellate Division, First Department, wrote in *Holmes* v. *Camp*, 180 App.Div. 409, 167 N.Y.Supp. 840 (1st Dept. 1917), a decision authorizing double derivative actions:

> "Representative actions by stockholders are unique, in that they are not prosecuted by the stockholder plaintiff for his own direct benefit or in his own direct right, or because any right of his has been directly violated, or because he is entitled individually to the relief sought. Such actions are, as they are commonly designated, purely representative; the plaintiff being permitted to maintain the action, notwithstanding his lack of direct interest, solely to set the machinery of justice in motion, and to prevent what would otherwise be a complete failure of justice. . . .
>
> "*The part which a stockholder plays in such an action is merely that of an instigator. The cause of action is that of the corporation, and the recovery must run in its favor.*" (180 App.Div. at 412, 167 N.Y. Supp. at 842) (emphasis supplied)

The same point is more compendiously stated in *Ross* v. *Bernhard*, 396 U.S. 531 (1970), a case which Mr. Phillips' brief mystifyingly cites as a prop for his present position. The Supreme Court there said:

> "[T]he derivative suit [is] viewed in this country as a suit to enforce a *corporate* cause of action against

officers, directors, and third parties." (396 U.S. at 524) (emphasis in original)

*Accord, Smith* v. *Sperling*, 354 U.S. 91, 97 (1957) ("The cause of action, to be sure, is that of the corporation."); *Price* v. *Gurney*, 324 U.S. 100, 105 (1945); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 737 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Spring* v. *Webb*, 227 Fed. 481, 484-85 (D.Vt. 1915).

The real plaintiff in interest in the present action is Alleghany. Its case is not Mr. Phillips' "own case." This consideration renders inapplicable 28 U.S.C. § 1654 (1970), which authorizes laymen to "plead and conduct their own cases personally." *

Mr. Phillips' secondary claim—that he is a "lawyer," not because he is a member of the Bar, but because he has acquired "learning" through his long career as a corporate gadfly—requires only brief comment. The principle which restricts the representation of others to the members of the legal profession reflects more than a concern for scholarship, important as that may be. It represents, as well, an attempt to insure the responsibility of those who speak for the legal rights of others and a means of subjecting such practitioners to a professional discipline.

As the New York Court of Appeals once wrote, when holding that even graduates of accredited law schools could not practice without prior admission to the Bar:

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* Mr. Phillips suggests that our appearance for Alleghany on this appeal demonstrates that he must be prosecuting this action for himself, not for the corporation. But we do not advocate, on behalf of Alleghany, a position as to the substantive merits of the derivative claim which remains after the District Court's decision. We present in this appeal Alleghany's distinct, and preliminary, interest in seeing that any substantive claims asserted in its name are presented by a legally capable and fit representative.

> "Recognizing that knowledge and ability alone are insufficient for the standards of the profession, a character committee also investigates and reports upon the honesty and integrity of the man, and all of this with but one purpose in view, and that to protect the public from ignorance, inexperience, and unscrupulousness." *People* v. *Alfani*, 227 N.Y. 334, 339, 125 N.E. 671, 673 (1919)*

See also *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975); *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U.S. 154 (1971), and cases cited therein; *Sobol* v. *Perez*, 289 F.Supp. 392, 400 (E.D. La. 1968).

## POINT II

### Mr. Phillips Has Not Demonstrated His Adequacy As a Representative As Required by Rule 23.1.

Alleghany's principal brief also urges that, by reason of several conflicts of interest (pp. 17-22) and other disabilities (pp. 23-25), Mr. Phillips does not meet the standard of "fair and adequate representation" required of derivative plaintiffs by Fed.R.Civ.Proc. 23.1. Although Mr. Phillips' attempted role as both a litigant and as an "attorney" seeking to collect "attorneys' fees" is an element, among many, of his disabling conflict, it should be stressed that this argument does not depend on Mr. Phillips' capacity as a *pro se* plaintiff.

Mr. Phillips' answering brief does not dispute the pendency of his "fee litigation" against Alleghany and its affiliate, Investors Diversified Services, Inc. ("IDS") or

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* Cited with approval in *Dacey* v. *New York County Lawyers' Ass'n*, 290 F.Supp. 835, 841 (S.D.N.Y. 1968), *aff'd*, 422 F.2d 188 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970).

his interest in collecting "attorneys' fees" in this case, an interest which no other Alleghany stockholder shares.* Nor does Mr. Phillips contest the obvious proposition that a "serious" conflict should be disqualifying under Rule 23.1.

Rather, Mr. Phillips simply asserts that the matters identified by us and acknowledged by him are not "conflicts" (Answering Brief pp. 23-26). We disagree for the reasons already stated in Alleghany's main brief. The Court has the materials it needs to make the only judgment which counts—its own.

Mr. Phillips attempts to dismiss his role in the "fee litigation" by arguing there has not yet been a conflict between his interests in that suit against an affiliate of Alleghany and (by reason of Fed.R.Civ.Proc. 54) Alleghany itself and those of Alleghany which he presumes to assert in this one. No member of the Bar who was representing Mr. Phillips in the "fee litigation" would attempt to appear for Alleghany in this action. But even if Mr. Phillips' technical claim is sound, it ignores the prophylactic intent of Rule 23.1, which seeks to prohibit representation in situations in which even a substantial potential for conflict exists. See, *e.g., Stull* v. *Pool,* 63 F.R.D. 702, 704 (S.D.N.Y. 1974), and *duPont* v. *Wyly,* 61 F.R.D. 615, 622 (D.Del. 1973), discussed in Alleghany's main brief (pp. 22-24), and *GA Enterprises* v. *Leisure Living Communities, Inc.,* 66 F.R.D. 123 (D. Mass. 1974), *aff'd,* 517 F.2d 24 (1st Cir. 1975).

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* Since the submission of Alleghany's principal brief, Mr. Phillips has created still another source of potential conflict. On or about May 25, 1976, he launched another derivative action, this one through a member of the Bar in the name of Alleghany in the New York State Supreme Court (*Phillips* v. *Kirby, et al.*). This new action attacks certain of Alleghany's transactions in Penn Central stock, which were the subject of claims which District Judge Ward dismissed from this action in November, 1975 (Joint Appendix 10a-12a).

*GA Enterprises* is of particular relevance. There, the District Court held, and was affirmed by the Court of Appeals, that a representative plaintiff would not be allowed to maintain a stockholder's derivative action where he owned less than one percent of the corporation's common stock, the suit was filed well after the eruption of wide-ranging disputes between the derivative plaintiff and the corporation, and the stockholder's stake in his derivative action paled in comparison with the magnitude of his other interests with respect to the corporation. In so holding, the District Court stated:

> "[I]t seems clear that where the interests of the named plaintiff and the shareholders on whose behalf he is suing, are antagonistic, and this antagonism is the kind which could influence the conduct of the case, such a situation should be resolved by dismissal pursuant to Rule 23.1. *There is nothing that this Court sees in the underlying policy for the rule which would require limiting the inquiry for possible conflicts to the subject matter of the suit. Thus, the Court will consider all potential sources of conflicting interests.*" (66 F.R.D. at 126) (emphasis supplied)

Problems such as those foreseen in *Stull, duPont* and *GA Enterprises* are abundantly present in this case and should be similarly averted by Mr. Phillips' disqualification as a representative plaintiff.*

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* See also *Yaroff* v. *The May Company*, No. 75-1697 (6th Cir. Mar. 16, 1976), in which the Court of Appeals commented, as follows, on representational inadequacy in the context of a class action:

> "Rule 23(a)(4) of the Federal Rules of Civil Procedure provides that a representative party must 'fairly and adequately protect the interests of the class.' For the same individual to attempt representation of the class as plaintiff and as counsel presents an inherent conflict of interests. Because

## CONCLUSION

The Court should put an end to this latest skirmish in Mr. Phillips' long vendetta against Alleghany. He is neither a fit plaintiff nor a fit "attorney" to maintain this derivative action. For the reasons stated herein, as well as for the reasons stated in Alleghany's original brief, this appeal should be granted, and so much of the order of the District Court as is appealed from should be reversed.

Respectfully submitted,

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June 14, 1976

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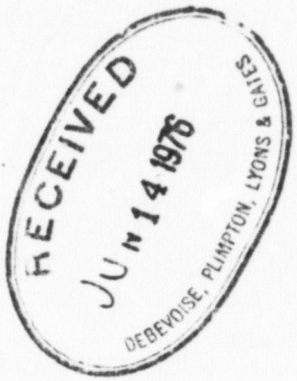
the financial recovery for reasonable attorney's fees would dwarf the individual's recovery as a member of the class herein, the financial interests of the named plaintiffs and of the class are not coextensive. If the interests of a class are to be fairly and adequately protected, if the courts and the public are to be free of manufactured litigation, and if proceedings are to be without cloud, the roles of class representative and of class attorney cannot be played by the same person." (Slip opinion at p. 2)

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